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[*Tritt v. Fluor Constructors, Inc.*](#), 88-ERA-29 (ALJ Jan. 12, 1989)

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U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: January 12, 1989

CASE NO. 88-ERA-29

IN THE MATTER OF

DOUGLAS A. TRITT
COMPLAINANT

VERSUS

FLUOR CONSTRUCTORS, INC.
RESPONDENT

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Douglas A. Tritt, an employee of Fluor Constructors, Inc. (hereinafter referred to as Fluor or Respondent), was discharged on December 3, 1987. He subsequently filed a complaint alleging a violation of the employee protection provisions of § 5851(a) 1982. The Administrator of the Wage and Hour Division, U.S. Department of Labor, investigated the allegations in the complaint and concluded that Mr. Tritt had failed to prove his contentions in that:

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You were laid off, not for refusing to work in an unsafe area, but because the firm had no work for you and several other electricians.

Mr. Tritt filed a timely appeal from that Decision. He seeks back compensation for loss of wages between December 3, 1987 and January 8, 1988, plus fringe benefits.

This case was consolidated for hearing with the cases of two other individuals who had also filed complaints against Fluor, but whose appeal bases were entirely different than that of Mr. Tritt. A great deal of the evidence received into this record concerning the company operation was pertinent to each of the complainants. This Recommended Decision relates only to the disposition of issues relating to the complaint filed by Douglas A. Tritt.

The FINDINGS OF FACT AND CONCLUSIONS OF LAW which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record,¹ arguments of the parties, and applicable regulations, statutes, and case law. I find the testimony of all of the witnesses to be credible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Crystal River Power Plant (hereinafter referred to as Power Plant) located in Crystal River, Florida, is owned by the Florida Power Corporation. The Power Plant is located upon approximately forty-seven hundred acres, and has four fossil fuel units or coal burners and one nuclear unit. Florida Power employs approximately eight hundred individuals in the operation of the Power Plant. Fluor Constructors, Inc., has a supplemental maintenance contract with Florida Power to provide additional maintenance forces at times when Florida Power is either unable to hire individuals

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quickly enough or under circumstances where modifications to the plant are required. All activities of Fluor conducted at the Crystal River site are controlled by Florida Power procedures and Florida Power policy pursuant to the terms of the Fluor Maintenance Contract. Radiological safety is the responsibility of Florida Power. Fluor provides maintenance services only in the nuclear plant which is Crystal River Unit 3. Fluor's initial contract with Florida Power for maintenance work went into effect in April of 1984, and was for a term of two years. The contract was worth approximately forty-two million dollars. A second contract was subsequently received by Fluor for an additional two-year period. The second contract carried a value of twenty-one million dollars. Fluor now operates under a third contract from Florida Power for maintenance services which carries a contract value of approximately six to seven million dollars.

The procedure that is followed by the two companies is for Florida Power to submit work assignments to Fluor for cost estimates. The estimate of Fluor relates to the number of man hours required to complete the job and also the dollar value. Florida Power then approves the work assignment in the form of a work authorization and it is only upon receipt of that authorization that Fluor commences its activity. The size of the Fluor work force is determined by the volume of work contained in the work authorizations. Fluor can do no work whatever until a work authorization is received.

The Crystal River 3 nuclear unit is subject to two different types of outages. The unit is on an eighteen-month refueling cycle so that every eighteen months there is a normal refueling outage at which time the reactor is either completely or partially defueled and new fuel is added. Modifications and necessary maintenance are also performed during this outage. The nuclear unit is also subject to forced outages which are caused by breakdowns in a component or due to malfunctions of some type. A forced outage is

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necessitated by repairs performed to correct these problems. Immediately following the repair work, the unit is then brought back on-line. These outages can vary in length.

Douglas A. Tritt was hired by Fluor to perform work at the nuclear plant during a scheduled refueling outage. Mr. Tritt is commonly referred to as a worker who is a "traveler." Travelers are individuals who work outside of the jurisdiction of their own local union and who travel from outage to outage between nuclear facilities. The travelers will work at a facility until the outage work has been completed and the layoffs begin. At that point, they will move to another nuclear facility for employment. This employment between facilities as a traveler is desirable because normally, they are employed in an overtime situation, that being six days a week, twelve hours a day, or seven days a week, twelve hours a day. Because of the overtime, the travelers make very good money for a short period of time.

George S. Renshaw, who was the Project Site Manager for Fluor, testified at the hearing. He gave considerable background information and noted that he had final responsibility for the hiring and firing of all Fluor employees. The extent of the work required by the maintenance contract dictates the hiring and layoff policy. The first people to be let go during the concluding period of the outage are the travelers. That policy is dictated by a potential grievance problem from the local employees and local unions. Following the termination of the travelers, Fluor's policy is to terminate the individuals in the local Union and after they are gone, the core unit of employees is then reduced if that becomes necessary.

Douglas Tritt was hired by Fluor during the Refuel Cycle VI outage. (RX F) The electrician manpower reached a maximum of ninety-seven individuals on October 6, 1987, and subsequently was reduced to nineteen individuals as early as January 12, 1988. Weekly terminations of electricians had taken place since October 20, 1987. (RX F) Three electricians had been let go

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between November 17 and November 24, 1987. Six electricians were let go between November 24 and December 1, 1987. Between December 1 and December 8, 1987, thirteen electricians had been let go, reducing the number on the payroll to sixty-six. By

the end of December 1987, the number of electricians had been reduced to thirty-five and by January 12, 1988, the number had been reduced to nineteen. The Refuel VI outage had originally been scheduled to end on November 28, 1987. However, Florida Power ordered additional modifications and the outage lasted until January 9, 1988, at which time the Nuclear Unit was brought back on line.

Safety responsibility at Crystal River 3 was shared between Fluor and Florida Power. Fluor had responsibility for the industrial safety of all of its employees. Industrial safety included the providing of safety glasses, hard hats, proper scaffolding, safety belts, and other measures similar to these. These items would have had to have been provided by Fluor regardless of whether their employees were working around a nuclear facility. Florida Power had responsibility for all of the radi-ological safety pertaining to the nuclear operation. Radiological safety pertains to all work in the radiation controlled areas (hereinafter referred to as RCA) that may require a radiation survey and a radiation work permit request (hereinafter referred to as RWP). The contract between Fluor and Florida Power specifies these responsibilities. Fluor does not have its own Health Physics Technicians (hereinafter referred to as HP). The Fluor RWP is directed to the Florida Power Health Physics Unit, who in turn, visit the work area to determine the safety precautions which must be taken by the workers. Once HP personnel have completed the reconnaissance of the work area, they write the RWP and define all of the requirements concerning dress-out, respiratory protection, and any other protective measures. The RWP is then issued and is good for thirty days. The RWP's are subject to change while the job is continuing. The Chemistry and Radiation Department or Chem-Rad Department

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at Florida Power is responsible for the radiological safety of Crystal River 3.

Mr. Tritt was hired as an electrician since that was his trade and he was sent to an area which had little radiation. He spent the majority of his time in that area and the control room puffing in relays. Initially, he was sent to school in order to gain a better understanding of radiation and how to work safely around radiation. He was advised at that school that any time he has problems working in an area because he believes it to be unsafe, that he should come out of the area and go to his *supervisor* for assistance. Mr. Tritt testified that he has no problem working around radiation, and that he has a fairly good understanding about employment around these facilities because of his prior work record.

During the Refuel VI Outage, Fluor supplied supplemental manpower for Florida Power to work in its electric shop. During the outage, Fluor maintained approximately forty people in the electric shop, and these were not always the same individuals. Toward the end of the outage, Fluor was rolling some travelers out of the electric shop and some of their own people into the electric shop. As was noted above, substantial reductions were occurring within the electrician ranks starting the week of November 24, 1987. (RX

F) On December 7, 1987, Fluor laid off ten electricians. (RX G) The forty individuals working in the electric shop varied because of layoffs of travelers, and other workers being assigned to replace them. As the maintenance work is being completed and the outage concluded, some travelers request that they be laid off early so as to allow them to be the first to obtain employment at the next job, and other travelers are simply laid off based upon work demands. Some of the individuals being moved to the electric shop were core employees. The electric shop is located in what is called a warehouse building inside the protected area.

Mr. Trim testified that during the latter part of November 1987, he knew that the end of the

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outage was near and that there was some discussion within his work crew about the first layoffs occurring very soon. He had heard discussions that if he was able to transfer into the electric shop, that he may gain several more weeks of work. The electric shop was completely controlled by Florida Power. Fluor employees were simply assigned to Florida Power to work in the electric shop under the direct supervision of Florida Power. The work is assigned by the Florida Power supervisors. On November 30, 1987, he was asked to report to the electric shop. His testimony was that he did not have a foreman but was supervised by an individual called a lead man.

Following this transfer, Mr. Tritt studied "paperwork" which had been provided to him and also put some PC tubes together, which were to replace tubes located on top of the reactor head. He also had an ALARA meeting² to attend prior to entering the containment area. At this meeting, Mr. Tritt was advised that the area of the plant in which he was to work was one of the hottest areas in the plant in terms of radiation exposure. His work assignment was discussed and he testified that the workers were to have been provided an air monitoring machine and a health physics technician who would ensure that there is no airborne contamination. Mr. Tritt inquired at the meeting as to whether respirators were needed and he was advised that they were not unless work was performed on the top of the reactor. The instructor at this meeting was a Florida Power Company employee. The ALARA meeting was the first procedure taken before entering a radiation controlled area. Mr. Tritt was advised as to what type of clothing to wear, whether respirators were required, and he was advised as to what to do to protect himself against radiation and possible airborne contamination. Mr. Tritt was told that if he believed an area to be unsafe, that he should leave that area and express the concern to his immediate *supervisor* or to a *supervising* HP. (Tr. 709)

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The day following the ALARA meeting, Mr. Tritt commenced work in the morning in a radiation controlled area where the reactor was located. An HP also accompanied his

group of workers and she advised them where the water spots were located so that they would work away from those areas. An air monitoring machine was also operating in the area. Apparently no work-related problems were encountered by the group in the morning.

Following the lunch hour break, the assigned HP was changed and the monitoring machine was removed from the reactor area. The second HP who appeared after lunch indicated that respirators were supposed to be used in the area. The testimony of Mr. Tritt was that the HP suggested that he would not go into the work area without a respirator. The HP then left the area and the employees commenced their job assignments. In the course of that work, Mr. Tritt testified that he noticed dust or rust particles falling off the bottom of an object. During the afternoon work, Mr. Tritt raised no objections concerning the safety of his work area and he concluded the day's work as scheduled. Apparently, all of his coworkers also concluded the work as scheduled, and the record does not indicate that any other party questioned the safety of the work area.

That evening and following the conclusion of the day's work, Mr. Tritt decided to pursue a complaint with the Union concerning the work area. The next morning, he did not go back to the work site, but went directly to his Union Steward in order to express his safety concerns. On this morning, he did not know whether an HP was on duty, nor did he know whether any other changes had been made to the work site. (Tr. 116) The record clearly shows that he did not visit his work site that morning even though he may have reported to the electric shop. (Tr. 132) Mr. Tritt was advised by James Brown, the Union Steward, that he was under the supervision of Dick Brown from Florida Power and he was then taken to his office. Mr. Tritt told Dick Brown that he did not want to go back into the area until he found out why the

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air monitoring machine had been removed and why respirators were not being used. Mr. Tritt explained his decision this way:

As I got home, I got to thinking about what had happened. I got to thinking about the rust. I got to thinking about not having the respirators there. I got to thinking about the air marking machine being taken out and the HP not knowing who did it and I felt like I had a legitimate complaint when I went in the next morning.

(Tr. 102)

Mr. Tritt did not lodge a complaint with any of the safety personnel at Chem-Rad which was the department of the health physics technicians. (Tr. 117)

At this time, Mr. Tritt's supervisor at Fluor was O. C. "Buck" Comfort, who was the lead electrical superintendent. Dick Brown was his Florida Power supervisor, but he remained under the direct supervision of Buck Comfort.

Before the Union Steward had taken Mr. Tritt to the office of Dick Brown, he had advised him to return to his work assignment. (Tr. 108) Dick Brown told Mr. Tritt that if he had come to him the afternoon of the prior day instead of the following morning, that he could have done something about the matter, but in the meantime, there was nothing he could do about it the following day. (Tr. 104) Mr. Tritt told Mr. Brown that he did not want to go back into the area until he found out why the air monitoring machine had been taken out and why it wasn't on the RWP for the workers to have respirators. (Tr. 104)

Following that conversation, Dick Brown telephoned Buck Comfort and Mr. Tritt testified that Mr. Brown advised Buck Comfort that he had a problem with HP, and that he did not want to reenter the work area. A memorandum of Mr. Comfort concerning that matter indicates that he was not advised by either Mr. Brown or Mr. Tritt that an HP controversy over the use of respirators was

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mentioned to him. Mr. Comfort believed that the Complainant was interested in getting himself fired so that he could draw his full pay instead of quitting and having to wait for the mails to bring a part of his compensation to him. Apparently, in discussions which Mr. Comfort had with Mr. Tritt previously, Mr. Tritt had indicated that he wanted to be off work during the holidays and he had intentions of going to another job afterwards. (RX H) In a conversation that Mr. Comfort had with Mr. Renshaw immediately following this incident, Mr. Comfort did not advise Renshaw that any safety-related problems were associated with the termination of Mr. Tritt. (Tr. 710) Mr. Comfort told Mr. Renshaw that it was his belief that Mr. Tritt simply wanted his money. (Tr. 713) Mr. Renshaw did ask if Tritt was a traveler and he noted that within the week, he would be laying off additional electricians. Mr. Renshaw then advised Mr. Comfort that he was to tell Mr. Tritt that if he did not reenter the reactor building, he would be terminated for refusing a job assignment. That message was then conveyed to Mr. Tritt. When he continued to refuse, the supervisor directed that Mr. Tritt be taken to an area in order to get a whole body count which was done immediately prior to termination. Following the taking of the body count, he also turned in his clearance badge. He later signed a Termination Notice and Tool Room Clearance. (Exh. 1) The Termination Notice showed that he had been discharged for refusing a job assignment. Following the signing of the Termination Notice and Tool Room Clearance, Mr. Tritt was paid all of the monies owed him by Fluor Corporation.

ISSUE

Whether Douglas A. Tritt was discriminated against by Fluor Constructors, Inc., as the result of his having been fired for refusing a work assignment.

CONCLUSIONS OF LAW

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U.S.C.A. § 5851, which provides, in pertinent part, as follows:

(a) Discrimination against employees

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1964, as amended [42 U.S.C.A. § 2011 et seq.].

In order to establish a *prima facie* case of discrimination against Fluor Constructors under this statute, Douglas Tritt was required to prove by a preponderance of the evidence, the following:

1. That the party charged with discrimination is an employer subject to the Act(s);

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2. That the complainant was an employee under the Act(s);

3. That the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

4. That the employee engaged in "protected activity,"

5. That the employer knew or had knowledge that the employee engaged in protected activity; and

6. That the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.

Once Mr. Tritt had established a *prima facie* case, the burden of proof would then shift to Fluor constructors to prove affirmatively that the same decision as to termination would have been made even if the employee had not engaged in the protected activity.

The record clearly shows that Fluor Constructors, Inc., was the employer of Douglas A. Tritt, and that he was an employee of that concern. The record also clearly shows that Douglas A. Tritt was discharged by Fluor Constructors on the morning of December 3, 1987. Although differences may exist between Federal judicial circuits, when asserted in proper circumstances, the Secretary has determined that a refusal to work is a protected activity. The Secretary has announced the standard to be applied in these cases to be:

A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience.

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Pensyl v. Catalytic, Inc., 83-ERA-2 (January 13, 1984).

The Secretary also concluded that a refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and government inspectors, if appropriate, and, if found safe, adequately explained to the employee. *Bennett v. Kaiser Aluminum and Chemical Corp.*, 2 MSHC 1424 (1981). Applying those standards to this case leads me to the inescapable conclusion that Douglas Tritt was not engaged in a protected activity when he refused his work assignment on the morning of December 3, 1987. That conclusion is based upon an evaluation of this entire record while giving careful consideration to the contentions made by Mr. Tritt at the time of the hearing.

I do not believe that Mr. Tritt carried a reasonable belief that working conditions were unsafe or unhealthful on the morning of December 3, 1987. The record contains no evidence whatsoever that he even visited the job site on that morning. His testimony was that he went directly in to see the Union Steward, who in turn, took him to his supervisor at Fluor Power. Therefore, I do not believe that on the morning of his termination he could even have been aware of the working conditions in the electric shop. The record discloses that company officials were aware that safety conditions in the reactor building could change daily. (Tr. 721) Just as management had determined that circumstances did not warrant the air monitors or the HP technician's presence in the afternoon of December 2, 1987, it is conceivable that those precautions were taken again on the morning of December 3, 1987. Since Mr. Tritt had not visited the job site, he would not have known whether his concerns had been addressed.

Mr. Tritt testified that his objections were not necessarily to a safety problem, but only to the

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absence of the monitoring machine and a question in his own mind as to whether respirators were required. (Tr. 104, 713) Since he had not visited the work area in the morning of December 3, 1987, he could not have known whether either of those concerns had been addressed in the interim.

Mr. Tritt testified that on two different occasions, he attended safety school and that he had been instructed to report to his supervisor or to a supervisory HP, any safety concerns that he may have. (Tr. 709) Mr. Tritt had testified that he was not afraid to work around radiation because he had a fairly good understanding of employment around nuclear facilities based upon his prior work record. From his schooling and his prior work record, I must conclude that he was knowledgeable as to the proper method for lodging safety complaints. He opted, however, to report the problem to his Union Steward rather than to any supervisory personnel. Since he failed to follow established procedures, I conclude that his basis for raising the safety question was something other than a desire to correct a perceived problem.

There were also portions of Mr. Tritt's testimony which concern me. Although I have concluded that Mr. Tritt was a credible witness, I also believe that there were portions of his testimony which he embellished in attempting to carry his proof burden in this case. Mr. Tritt made several references to having seen either "dust" or "rust" on the first day on the job which gave him cause for alarm. I do not interpret those terms to be synonymous with each other, and therefore, his characterization of one for the other leaves doubt in my mind as to exactly what was perceived, if anything. Also, Mr. Tritt testified that Dick Brown, who was the supervisor at Florida Power, had told Buck Comfort of Mr. Tritt's HP concerns. (Tr. 104) However, Mr. Comfort's memorandum in that regard disputes that contention. (RX H) Mr. Tritt also denied at the time of the hearing that he was interested in being terminated in order to obtain

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full compensation on the date of termination, rather than having to wait for a portion of that compensation to be mailed to him. His Florida Power supervisor seems to have had a different impression. (RX H) Mr. Renshaw's testimony at the time of the hearing tends to corroborate the feeling of Mr. Comfort.

For each and all of these reasons, I conclude that Mr. Tritt did not have a good faith, reasonable belief that working conditions were unsafe or unhealthful at the time he refused his job assignment on the morning of December 3, 1987. Therefore, I find that his refusal to work on that morning was not a protected activity under the Act. Mr. Tritt's proof burden has not been sustained and his complaint must fail for that reason.

George S. Renshaw was the company official who gave the directive to have Mr. Tritt terminated. He testified that he had no personal knowledge of Mr. Tritt as a company employee, and that he had not been advised as to any safety concerns expressed by Mr. Tritt prior to the time of his termination. Mr. Renshaw also testified that he had been

advised that Mr. Tritt wanted to be terminated in order to gain immediate access to his compensation, rather than having to wait for a portion of it to be paid through the mails. That being the case, Mr. Renshaw acknowledged that he was to lay off a number of electricians at the conclusion of that same week, and that therefore, Mr. Tritt should be terminated for refusing a job assignment. The record clearly shows a pattern of electrician reductions by Fluor during this period. Therefore, Mr. Renshaw did not know that Mr. Tritt had expressed safety concerns, and this record contains no evidence that there was a retaliation against the employee which was motivated in any way by his having expressed safety concerns.

For the reasons indicated, I conclude that Douglas A. Tritt has failed to establish a *prima facie* case of discrimination under this Whistleblower statute.

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RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that the complaint of Douglas A. Tritt be dismissed for failure to state a cause of action for which relief is available under the provisions of 42 U.S.C. § 5851.

RUDOLF L. JANSEN
Administrative Law Judge

[ENDNOTES]

¹ In this Recommended Decision, "CX" Complainant's Exhibits, "RX" refers to Respondent's Exhibits, and "Tr" refers to the Transcript of hearing.

Subsequent to the hearing and at the request of the Administrative Law Judge, the entire earnings record of Douglas Tritt with Fluor Constructors was submitted. That record is received into evidence as Complainant Exhibit 1 (CX 1).

² ALARA stands for "As Low As Reasonably Achievable."